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In re:

MATHENY,

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HAROLD S. MARENUS, CLERK U.S. BKCY. APP. PANEL OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

BAP No. CC-05-1371-KPaJ

Bk. No. SA 03-13469 JB

Debtors.

RICHARD A. MARSHACK, Chapter 7) Trustee,

PAUL E. MATHENY and DEBRA R.

Appellant,

MEMORANDUM*

PAUL E. MATHENY; DEBRA R. MATHENY,

Appellees.

Argued and Submitted on February 23, 2006 at Pasadena, California

Filed - March 9, 2006

Appeal from the United States Bankruptcy Court for the Central District of California

Honorable James N. Barr, Bankruptcy Judge, Presiding.

Before: KLEIN, PAPPAS and JAROSLOVSKY, ** Bankruptcy Judges.

^{*}This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

^{**}Hon. Alan Jaroslovsky, Bankruptcy Judge for the Northern District of California, sitting by designation.

The nub of the dispute in this saga is that the debtor said that she suffered from a back injury after an allegedly tortious altercation. Her physician testified that he could find no evidence of physical injury. The lawsuit settled for \$100,000. The bankruptcy court overruled the trustee's objection to the debtors' claim that \$39,745.00 of the proceeds were exempt under California law as damages for bodily injury and for loss of earnings. We AFFIRM.

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FACTS

Paul and Debra Matheny, debtors and appellees, filed a chapter 7 case on May 6, 2003. One of the scheduled assets was an unfiled cause of action for assault and battery of "unknown" value, which they claimed as exempt pursuant to California Code of Civil Procedure ("C.C.P.") §§ 703.140(b)(5) and 703.140(b)(10).

Per Schedule I, Mr. Matheny was retired and received \$1,186.00 per month in social security payments. Ms. Matheny was a self-employed hair stylist who made \$2,500 per month.

On June 27, 2003, the debtors filed a tort action against Toula Arvanitis Dalpe in Orange County Superior Court seeking damages for negligence and assault and battery.

The complaint alleged that Dalpe, "adorned in martial arts attire," entered Canyon Hair & Nails Salon, began screaming at Ms. Matheny, and demanded that she remove Dalpe's hair extensions and/or give her the chemicals necessary to remove them. After a verbal exchange graphically detailed in the state court complaint, the defendant allegedly propelled Ms. Matheny into a

workstation and a wall, causing injuries. Ms. Matheny alleged that she suffered a soft-tissue back injury and was unable to work as a result of the incident for an indefinite period of time.

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The debtors amended their schedules to provide more detail about the lawsuit, which they now estimated to have a value of \$400,000, and added by footnote:

This is only an estimate at this stage of the litigation. The estimate is based upon an estimated \$300,000 in compensation of loss of future earnings of the debtor and \$100,000 for punitive damages awarded not an [sic] of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss.

Amended Schedules filed on September 8, 2003, at pgs. 2-3.

The debtors revised their exemptions to claim: (1) \$18,225 for punitive damages pursuant to C.C.P. § 703.140(b)(5) ("wild card"); (2) \$17,425 pursuant to C.C.P. § 703.140(b)(11)(D) ("personal bodily injury"); (3) \$300,000 pursuant to C.C.P. § 703.140(b)(11)(E) ("loss of earnings").

The trustee filed an objection to the claimed exemptions for bodily injury and for loss of future earnings, but not to the \$18,225 claimed under the California "wild card" exemption applicable to "any property."

The objection was resolved in two installments. First, there was a preliminary hearing on February 17, 2004, which included a request by the debtors that the cause of action be abandoned. The court deferred action on the exemption dispute as premature before the outcome of the lawsuit was known and declined to order the asset abandoned. The second installment was the final hearing on the merits on August 17, 2005.

At a June 2005 status conference, it was reported that there was an agreement to settle the lawsuit for \$100,000 that would require court approval and that the parties needed a schedule for litigating the exemption dispute. The court set a schedule and fixed a hearing on the merits for August 17, 2005, which hearing resulted in the order overruling the objection to exemptions.

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The record considered at the final hearing included the papers that had been presented at the initial February 2004 hearing that had been continued as premature, as well as supplemental papers filed in preparation for the August 17 hearing.

The trustee's objection to an exemption for bodily injury damages was predicated on inadequate evidence. The trustee contended, citing In re Ciotaa, 222 B.R. 626, 633 (Bankr. C.D. Cal. 1998) and In re Hanson, 226 B.R. 106 (Bankr. D. Idaho 1998) (Oregon law), that the debtors had to present the court with "convincing certification of the injury to demonstrate that she [had] suffered an appreciable injury."

The trustee further contended that the evidence suggested that the debtor did not suffer <u>any</u> bodily injury: (1) the report submitted to the Anaheim Police Department did not mention personal injuries; and (2) one of the witnesses reported that she never saw anyone get pushed or fall during the altercation.

The trustee's objection to the debtors' exemption for loss of future earnings was based on four grounds: (1) absence of reported injuries in the police report; (2) the K-1 tax statements from Ms. Matheny's beauty salon partnership for 2001 and 2002, which indicated that she made virtually no income

during these years, which, when compared with the \$2,500 per month income stated on Schedule I, indicated that her income increased after the alleged injury; (3) omission from the original schedules of an assertion of a property interest in, and claim of exemption for, lost income; and (4) any actual loss of income was more likely due to the transfer of her partnership interest in the beauty salon to her daughter in 2002.

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The debtors' filed their initial response to the trustee's objection in January 2004. Their response included Ms. Matheny's declaration, as well as a legal argument invoking Federal Rule of Bankruptcy Procedure 4003(c) and the Ninth Circuit decision in Carter v. Anderson (In re Carter), 182 F.3d 1027, 1029-30 n.3 (9th Cir. 1999). The debtors argued that the trustee's proffered evidence did not "rebut the presumptively valid exemption" and that the "[b]urden of [p]ersuasion always remains on the objecting party."

The debtors contended that loss of income was, as a matter of law, an element of damages for the cause of action that was included in the original schedules and explained that her compensation was from direct services performed at her work station at the salon, which was free to her under the terms of the partnership, and that the salon partnership itself never made any money.

The record surviving from the February 2004 hearing included the trustee's written evidentiary objections to four statements in Ms. Matheny's declaration. The trustee objected to admission of the debtor's statement that she suffered from "a soft tissue back injury and resulting headaches" as a result of the

altercation with the customer and to the debtor's statements to the effect that her back injury "impeded her ability to work."

The other two objections were to the debtor's statements that her back injury "precluded" her from working. The evidentiary theories were that the statements were inadmissable as a lay opinion regarding a subject about which only an expert could testify, as without proper foundation, as not relevant, as hearsay not within a hearsay exception, and as not the best evidence.

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Once the \$100,000 outcome of the lawsuit was in view, the trustee supplemented his objections to the exemptions. He did not challenge the so-called "wild card" or "grubstake" exemption under C.C.P. § 703.140(b)(5). He contended that the remaining settlement funds that he calculated at \$39,745 were non-exempt property of the estate because Ms. Matheny did not prove that she suffered an "appreciable bodily injury." The trustee pointed to the absence of medical evidence injury and to deposition testimony of Ms. Matheny's physician, Paul F. Parks, Jr., M.D., an orthopaedic surgeon, that he could find no evidence that she suffered any injury to her back.

As to the "loss of future compensation" exemption, the trustee contended that under California law the right to the claim for lost future wages required a finding that the loss was the result of an injury, which made the physician's testimony fatal to that exemption as well.

In the debtors' reply to the trustee's supplement to objection, they contended: (1) the funds were for the settlement of a "personal injury claim"; (2) the trustee must have agreed

that there was an injury because he had "hired special counsel to prosecute the injury claim"; (3) the schedules, the state court complaint, the amended schedules, and her declaration all supported the debtor's contention that she had a bodily injury; (4) the only supplemental proof submitted by the trustee was the release in full of all claims and a copy of Dr. Park's deposition wherein he could not specifically or generally explain the cause of Ms. Matheny's back pain.

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On August 17, 2005, the court issued a tentative ruling. As to the exemption for personal bodily injury, the court tentatively ruled:

Overrule the T's objection because he did not meet his burden of proving that the exemption was not properly claim[ed] as required by Fed. R. Bankr. P. 4003(b). The T's reliance on In re Ciotta, 222 B.R. 626, 633 (Bankr. C.D. Cal. 1998) and <u>In re Kris Hanson and Sandy</u> K Hanson, 222 B.R. 626, 633 (Bankr. C.D. Cal. 1998), two non-binding trial court opinions, is misguided because those cases are factually distinguishable. Both the Ciotta and Hanson courts ruled that a debtor who was trying to exempt the proceeds of a sexual harassment lawsuit under a 'personal bodily injury' had to make a showing that she suffered physical injury (for that tort generally did not involve bodily injuries). Here, the debtor filed an action for battery which generally involves personal bodily The debtor also testified that she suffers injury. physical pain from the incident with Ms. Dalpe. Finally, the police report provides that one of Ms. Dalpe's children told an officer that his mother pushed the debtor. Thus, there is some evidence that the debtor suffered bodily injury.

Tentative Ruling, August 17, 2005, at pgs. 1-2.

Regarding the \$300,000 claimed exempt as compensation for lost earnings, the court tentatively ruled:

Overrule the trustee's objection because he did not meet his burden of proving that the exemption was not properly claim[ed] as required by Fed. R. Bankr. P. 4003(b). Here, the evidence indicates that the debtor, who is 51 years old, is currently earning approximately

\$29,000 less than her average income in 2001-2002. If that amount is multiplied by the debtor's likely remaining working years before retirement, the debtor would have approximately \$330,000 in lost future wages. Therefore, it cannot be said that the debtor's claimed exemption for loss of future earnings has no reasonable basis in fact.

Tentative Ruling, August 17, 2005, at p. 1.

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At the final hearing, the discussion focused on: whether the debtor's testimony established a bodily injury; the appropriate burden of proof; and the trustee's evidentiary objections. All of the evidence was admitted, except paragraph 16 of Ms.

Matheny's declaration ("My greatest concern is that my back continues to prevent me from working and I do not know how much longer I will be able to work, even part time."), which was excluded as irrelevant.

The court did not make separately-documented findings of fact and conclusions of law, but it did make its written tentative ruling part of its record. No party requested that direct examination or cross-examination be taken in the same manner as in an adversary proceeding.

The trustee argued that the debtors' evidence did not sufficiently establish that Ms. Matheny suffered an "appreciable bodily injury" which he contended meant "an injury that can be determined by some objective view point of a medical physician ... something that was physically changed about that person's body." The court responded to the effect that this analysis might be too rigorous because soft tissue injuries might only be evidenced by an inability to perform work.

The order overruling the objections to the debtors' claims of exemptions was entered on August 30, 2005.

This timely appeal ensued.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. \S 1334. We have jurisdiction under 28 U.S.C. \S 158(a)(1).

ISSUES

- 1. Whether the court erred by overruling the trustee's evidentiary objections' to debtor's declaration testimony regarding her injuries.
- 2. Whether the court clearly erred in ruling that the debtors could claim an exemption for personal bodily injury under C.C.P. \S 703.140(b)(11)(D).
- 3. Whether the court clearly erred in ruling that the debtors could claim an exemption for compensation for loss of earnings under C.C.P. \S 703.140(b)(11)(E).

STANDARD OF REVIEW

We review the scope of a statutory exemption de novo, as a question of law. Gonzalez v. Davis (In re Davis), 323 B.R. 732, 734 (9th Cir. BAP 2005). A bankruptcy court's findings of fact are reviewed for clear error. Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001). Clear error exists when, after examining the evidence, the reviewing court is left with a definite and firm conviction that a mistake has been committed. Davis, 323 B.R. at 734, citing, United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

DISCUSSION

The fundamental issue in this appeal is sufficiency of evidence to support the trial court's ruling. 1 As a mere factual matter, the debtor's declaration testimony provided "some" evidence of record to support the court's factual conclusions. In essence, unless the debtor's declaration should have been excluded in its entirety, any error in admitting evidence would be harmless in the face of a clear error standard.

The trustee's first argument on appeal is that the court erred by "allowing the medical testimony" in Ms. Matheny's declaration. The court ruled:

(1) paragraph three: "I suffer from a soft tissue back injury and resulting headaches" - overruled to the extent that she stated that she had a back injury;

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- (2) paragraph four: "The injury to my ba[c]k, and headaches, have seriously impeded my ability to work in the Salon" overruled, doesn't require expert testimony;
- (3) paragraph six: "After the injury to my back, I was unable to work the long hours in the Salon required of an owner" court stated that it was overruling all objections to this point.
- (3) paragraph 16: "My greatest concern is that my back continues to prevent me from working and I do not know how much longer I will be able to work even part time" simply a question of her concern, is not a statement of fact as to condition, and irrelevant.

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Tr. of Oral Ruling, at pgs. 14-16.

¹We do not address whether the trial court correctly assessed the burden of proof. Cf., Gonzalez v. Davis (In re Davis), 323 B.R. 732, 740 (9th Cir. BAP 2005) (Klein, J., concurring). Whether the trustee or the debtors bear that burden, the court's ruling was correct.

The trustee contends that while Ms. Matheny is capable of testifying whether she suffers pain, "her opinion that the pain is a result of a back injury suffered at the hands of [the defendant], is not made with sufficient scientific knowledge of medicine to allow said testimony to be permitted under Federal Rules of Evidence 701 and 702. Therefore any testimony of Debra Matheny that she suffered an injury, that her pain was caused by the injury or that she is unable to work as a result of the injury is inadmissible lay opinion."

Federal Rule of Evidence 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701.

In this instance, the court admitted Ms. Matheny's statements as opinion testimony by a lay witness, not testimony based upon scientific, technical, or other specialized knowledge within the scope of Federal Rule of Evidence 702. Under Rule 701, Ms. Matheny may testify as to her own opinions regarding her injured back and her inability to work as a result therefrom. Thus, the court did not err in overruling the trustee's objections and admitting the testimony. Any issue regarding the testimony would go to weight not admissibility.

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The trustee's central argument centers around the court's

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finding that the debtor's evidence sufficiently established that she sustained a bodily injury and that she was thus entitled to an exemption under C.C.P. § 703.140(b)(11)(D).

A debtor may claim exemptions for property under either state or federal law pursuant to 11 U.S.C. § 522. Sylvester v. Hafif (In re Sylvester), 220 B.R. 89, 91 (9th Cir. BAP 1998). When a debtor elects to claim an exemption under state law pursuant to § 522, the bankruptcy court looks only to the state law to determine the scope of that exemption. Id.

In this instance, \$17,425 of the settlement funds were claimed exempt as on account of personal bodily injury under C.C.P. \$ 703.140(b)(11)(D):

A payment, not to exceed seventeen thousand four hundred twenty-five dollars (\$17,425), on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent.

Cal. Civ. Proc. § 703.140(b)(11)(D).

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The trustee contends that the debtor's unsubstantiated statements in her declaration that she had a back injury were not enough to establish an "appreciable bodily injury" as articulated in <u>Ciotta</u> and <u>Hanson</u>. The bankruptcy court inquired into the term "appreciable" and stated that he was uncertain "where to put that in the panoply of gauges in terms of the extent to which there is injury ... where would you put appreciable in the range of dead and living? ... Living and injured and dead."

The court was not persuaded by the non-binding trial court opinions (<u>Ciotta</u> and <u>Hanson</u>) because they were factually distinguishable - those cases dealt with debtors who were trying

to exempt the proceeds of sexual harassment lawsuits under a "personal bodily injury" exemption. <u>Ciotta</u>, 222 B.R. at 633; Hanson, 226 B.R. at 107. We agree with the court.

The record in the instant case does not necessarily turn on a precise definition of "personal bodily injury." Simply put, the court considered three pieces of evidence: (1) the debtor's declaration; (2) the doctor's deposition testimony; and (3) the police report (to which no one objected).

The court was persuaded by the debtor's declaration, wherein she testified that as a result of the altercation with a customer at the Canyon Hair & Nails Salon, she suffered from a back injury, as well as headaches, that impeded her ability to work. Although Dr. Park testified that all the tests he conducted came back "normal," he also stated, as the debtor points out: "[T]here are so many causes for back pain, all the way from inflammation, muscular tears, strains, sprains. In this case, I was not able to narrow it down to one specific diagnosis." Thus, the court determined that Dr. Park's testimony was inconclusive.

Where two views of the evidence are permissible, the factfinder's choice between them cannot be clearly erroneous.

<u>United States v. Working</u>, 224 F.3d 1093, 1102 (9th Cir. 2000).

Ultimately, the court gave the debtor's declaration more weight than the doctor's deposition testimony. We cannot say that this was a clearly erroneous assessment of the evidence. Hence, the evidence of record supports the debtor's claimed exemption.

The trustee's final argument is that the court erred in

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allowing the debtors an exemption for lost earnings under C.C.P. \$ 703.140(b)(11)(E). This section provides, in pertinent part, that a debtor may exempt:

A payment in compensation of loss of future earnings of the debtor ... to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

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Cal. Civ. Proc. § 703.140(b)(11(E).

The debtors' Amended Schedule C exempted \$300,000. After the monies for the personal injury exemption are deducted from the debtors' settlement funds, the exemption for loss of earnings is in the amount of \$22,320.

In determining that the debtors could exempt \$300,000, the court explained that the debtor was 51 years old and was currently "earning \$29,000 less than her average income in 2001-2002. If that amount is multiplied by the debtor's likely remaining working years before retirement, the debtor would have approximately \$330,000 in lost future wages."

The trustee's argument on appeal regarding the loss of earnings exemption is brief. In addition to his assertion that there is no proof of injury, he contends that Ms. Matheny's K-1 tax forms indicate that she "virtually made no income" during 2001 and 2002, and that her Schedule I indicates that she now earns more money than before the incident.

The debtors respond that the K-1s were for the partnership only, not herself, and do not reflect the fees for services performed by her at her work station at the salon.

The evidence presented by the debtor to explain why the K-1 tax forms did not reflect her actual income supports the court's

ruling. We perceive no error in this regard.2

As a consequence, any error regarding the debtors' long-term needs would be harmless.

CONCLUSION

For the foregoing reasons, we AFFIRM.

²The trustee made clear during the hearing at the bankruptcy court that his argument turned only on whether or not the debtor sustained a physical injury. The court did not (and was not asked to) inquire into the debtors' present circumstances, other exempt property, present income, and any other factor relevant to determine whether the money is actually necessary to meet the debtor's basic needs. <u>Hanson</u>, 226 B.R. at 108. Nor did the trustee present any evidence in that regard.